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ALEXANDER L. STEVAS,
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No. 82-540

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the denial of a motion for partial summary judgment by a three-judge district court in a preclearance action under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, is appealable to this Court.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

Under Rule 16 of the Rules of this Court, the Attorney General moves to dismiss this appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-9a) is reported at 541 F. Supp. 1329.

JURISDICTION

The district court entered its order on June 28, 1982. The notice of appeal was filed on July 28, 1982. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c.[1]

STATEMENT

On April 7, 1982, the State of Mississippi filed the instant action in the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act

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[1]For further discussion of the jurisdictional question presented by this appeal see pages 3-6, *infra*.

of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that its legislatively-enacted Congressional redistricting plan, S.B. 2001, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. A three-judge court was convened pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284(a).

In accordance with this Court's decision in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the State attempted to prove that the redistricting plan embodied in S.B. 2001 did not have an impermissible effect under Section 5, because it did not constitute "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" when compared with the districting plan in effect since 1972. To this end the State filed a motion for partial summary judgment, asking the district court to decide whether the 1972 plan would serve as the appropriate benchmark against which to measure the redistricting plan in S.B. 2001.

The district court denied the motion (J.S. App. 1a-9a). It held that the proper benchmark for determining retrogression was a court-ordered plan that is presently in effect in Mississippi.[2] The district court concluded its memorandum opinion by noting that "[i]f [the State] is of the view that it can establish that the 1981 plan is not retrogressive in

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[2]The court-ordered plan was the result of a suit filed by black residents of Mississippi in the United States District Court for the District of Mississippi, seeking to enjoin implementation of S.B. 2001, because it had not been precleared by either the Attorney General or the United States District Court for the District of Columbia as required by Section 5, 42 U.S.C. 1973c (J.S. App. 6a). Because it was not possible to preclear S.B. 2001 in time for the then upcoming primary election and the preexisting districting plan was concededly malapportioned in light of the 1980 census, the Mississippi district court ordered into effect an interim plan for the 1982 election. See *Jordan* v. *Winter*, 541 F. Supp. 1135, 1141-1142 (N.D. Miss. 1982), appeals pending, Nos. 82-233 and 82-413.

comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date" (J.S. App. 8a). The State took no further action in the district court; it merely filed this appeal.

ARGUMENT

The jurisdiction of the Court over this appeal is governed by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which requires all declaratory judgment actions seeking preclearance to be "determined" by a three-judge district court and provides that "any appeal shall lie to the Supreme Court." Section 5 does not by its terms limit this Court's appellate review to final judgments. Nonetheless, we submit that the denial of a motion for partial summary judgment appealed from here by the State lacks the finality implicitly required by Section 5, and accordingly, this appeal should be dismissed for want of jurisdiction.

a. Although the appealability portion of Section 5 is relatively unusual in that it lacks any explicit reference to a final judgment, that omission by itself does not justify concluding that all interlocutory orders by the district court in a preclearance suit are appealable to this Court. This Court previously has interpreted 28 U.S.C. 1254(2), which also provides for appeal to this Court without mentioning the need for a final judgment when a court of appeals declares a state statute to be unconstitutional, as allowing an appeal only from final judgments or decrees. *Slaker* v. *O'Connor*, 278 U.S. 188, 189 (1929) (interpreting the predecessor provision to Section 1254(2)). See also *South Carolina Electric & Gas Co* v. *Flemming*, 351 U.S. 901 (1956); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920); *Martinez* v. *International Banking Corp.*, 220 U.S. 214, 223-224 (1911).[3] Thus, when

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[3]Although that interpretation has been questioned by this Court, it has never been overruled. See *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 82-83 (1958). See also *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 (1975).

Congress adopted Section 5 and provided merely for appeal to this Court, it properly could have assumed based on *Slaker* that no explicit reference to a final judgment was required.

Moreover, it is inconceivable that Congress intended every decision by the district court in a Section 5 action seeking preclearance to be subject to appellate review by this Court. Without a limitation to final judgments, every discovery order or other proced l ruling by the district court would be subject to an interlocutory appeal to this Court, because the statute's scope otherwise includes "any appeal."[4] The imposition of so onerous a burden on this Court's otherwise narrowly confined mandatory appellate jurisdiction ought not to be implied lightly from ambiguous statutory language.

Nothing in the legislative history of Section 5 of the Voting Rights Act indicates that Congress intended all interlocutory orders to be appealable. The House and Senate Reports merely indicate general dissatisfaction with the ability of the federal courts to keep pace with racially motivated voting changes adopted by some cities and states in response to court orders and therefore appeal immediately to the Supreme Court was provided to help expedite the preclearance process. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965); S. Rep. No. 162 (Pt. 3), 89th

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[4]In this respect Section 5 is significantly broader than 28 U.S.C. 1254(2), which limits the right to appeal to the federal questions presented. Indeed, it seems likely that the broad reference to "any appeal" in Section 5 was intended to make clear that all issues arising out of a final judgment in a Voting Rights Act case were properly a matter for the Supreme Court to review, thereby avoiding some of the confusion in other statutes regarding which issues in a particular case are reviewable in which court. See *Tidewater Oil Co.* v. *United States*, 409 U.S. 151 (1972) (interpreting Section 2 of the Expediting Act, 15 U.S.C. (1970 ed.) 29). See also *NAACP* v. *New York*, 413 U.S. 345, 354-355 (1973); note 5, *infra*.

Cong., 1st Sess. 6-7 (1965). Expeditious disposition of voting rights litigation would hardly be accomplished by allowing piecemeal review of the district court's interlocutory orders. The legislative history thus provides no indication that Congress intended to modify the traditional final judgment rule when it adopted Section 5. Accordingly, we submit that the provision in 42 U.S.C. 1973c for appeal to this Court must be limited to final judgments—or to orders "granting or denying * * * an interlocutory or permanent injunction" within the meaning of 28 U.S.C. 1253, which by its terms applies to any civil action required to be heard by a three-judge district court.[5]

b. This Court previously has recognized that denial of a motion for summary judgment is generally not a final order for purposes of appeal. See *Switzerland Cheese Association, Inc.* v. *Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84-85 (1981). Surely, the rule should be no more permissive for appeals to this Court than for appeals to the courts of appeals. And the district court's order in this case clearly was not final in any sense.[6] The court merely decided which

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[5]Nothing in *NAACP* v. *New York, supra*, is to the contrary. In that case this Court construed the language of Section 4(a) of the Voting Rights Act, 42 U.S.C. 1973b(a) (authorizing direct appeals to the Supreme Court in terms identical to Section 5) to permit an unsuccessful intervenor in a Section 4 suit to appeal to the Supreme Court. 413 U.S. at 355. In that case, however, a final judgment had been entered and the only issue was whether the unsuccessful intervenors could rely upon the expansive reference to "any appeals" to allow them to appeal directly to this Court the denial of their motion to intervene or whether they would have to seek review first in the court of appeals. *Ibid.* See note 4, *supra*.

[6]Obviously, the decision on the State's summary judgment motion is not a collateral order; the issue goes to the heart of the merits and accordingly is fully reviewable on appeal from a final judgment. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

previously employed congressional districting plan would serve as the benchmark at the forthcoming trial for deciding whether S.B. 2001 is retrogressive.

The State's right to litigate that issue in this Court is in no way jeopardized by a failure to obtain review at this time. If the district court finally concludes that S.B. 2001 is impermissibly retrogressive by employing a standard that the State believes is erroneous, that issue can be raised on appeal from the final decision of the district court.[7] Certainly, the State cannot show "that its opportunity for meaningful review will perish unless immediate appeal is permitted." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377-378 (1981). Accordingly, there is no basis for this Court to deviate from its established practice of declining to review a denial of a motion for summary judgment.[8]

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[7]Presumably the State must anticipate making some showing on the retrogression issue even if the court-ordered plan is the appropriate benchmark. Otherwise, it is incomprehensible why the State would file an appeal in this Court immediately instead of obtaining a final judgment from the district court.

[8]Since in our view the Court has no jurisdiction over the State's appeal, we have not addressed the question presented in the State's jurisdictional statement. If the Court requests, we will, of course, address that issue in a supplemental filing.